Supreme Court, U. S.
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No. 74-6293

In the Supreme Court of the United States

OCTOBER TERM, 1975

PHILIP J. GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (App. 113–123) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1974. On February 5, 1975, the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* (App. 124). By order of March 5, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including April 5, 1975. The petition was filed on April 3, 1975, and was granted on June 16, 1975 (App. 125). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner originally presented eight separate questions in his petition for a writ of certiorari. However, this Court granted the petition "limited to Question 8 presented by the petition" (App. 125), which reads as follows (*ibid.*):

> Whether 18 U.S.C. § 3500, the Jencks Act, contains an "attorney's work product exception"; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time, where the witness corrected same, which notes were prepared "only after lengthy conversations had occurred and a mutual understanding of the factual situation" had been reached, if not compellable under the Jencks Act, are compellable under the doctrine of *Brady* v. *Maryland*.

STATUTE INVOLVED

18 U.S.C. 3500, the Jencks Act, provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as

> hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably

required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATEMENT

After a seven-week jury trial in the United States District Court for the District of Arizona, petitioner was convicted on fourteen counts of mail fraud, in violation of 18 U.S.C. 1341. See App. 33–47. He was sentenced to concurrent terms of two years' imprisonment and fined $1,000 on each count (App. 111). The court of appeals reversed his conviction on one count and affirmed as to the remaining thirteen counts (App. 113–123).

A. THE EVIDENCE AT TRIAL

1. The evidence at trial showed that petitioner was the owner and president of Financial Security Life Insurance Company (FSL), an Arizona corporation. He devised a scheme to defraud banks and other lending institutions by inducing them to extend loans on the basis of collateral that was worthless but whose lack of value was deliberately concealed.

The scheme worked in the following way: The company would issue single premium annuity policies that purported to be fully prepaid and thus to have a cash surrender value equal to their face amounts. The policies actually had no cash surrender value because they were paid for by premium notes on which only the first year's interest had been prepaid; the policies themselves served as collateral for the notes (Tr. F–44).[1] Purchasers of the annuity policies would offer the policies to banks and other lending institutions as security for loans. The scheme was able to succeed because, in considering whether to grant the loans, the lending institutions would make inquiry of Financial Security Life regarding the validity and value of the annuity policies. In response, the FSL

[1] There are 15 volumes of transcript, consecutively lettered A through O. References will be to the volume letter and the page, except where the excerpt from the transcript has been included in the Appendix filed in this Court, in which case it shall be designated "App.".

would purposely conceal the fact that the policies had not been paid for in cash and would represent (either implicitly or explicitly) that the policies had cash surrender value and that the premiums were paid in full (Tr. F–74, E–395—E–398, K–37—K–40). On the basis of these representations, the lending institutions would authorize the loans. It was only later, if the lending institutions had occasion to foreclose on the loans and seek immediate payment on the policies, that they would discover that the policies had no value (Tr. E–14—E–15).[2]

Petitioner obtained a two-fold benefit from this scheme. First, Financial Security Life received yearly interest payments on the notes used to purchase the policies. More importantly, the "sale" of the annuity policies and the acceptance of the premium notes inflated the financial assets of the company on paper and thus presented a financial picture far more impressive than was the fact. Since petitioner's ultimate goal was to sell FSL and other companies he con-

[2] The evidence supporting Count 3 of the indictment is typical. Robert S. Clark, a co-defendant who pleaded guilty, obtained first an $80,000 loan and thereafter a $10,000 loan from the Mid-Continent National Bank of Kansas City, Missouri (Tr. D–261, D–419, D–422—D–423, D–442), offering as collateral five single-premium annuity policies, each having a face value of $20,000 (D–238). Before extending the loans, the bank mailed questionnaires regarding the policies to Financial Security Life; Clark personally returned the completed questionnaires to the bank (Tr. D–437). The completed questionnaires represented that the cash value of each policy was $20,000, that there were no existing assignments of record, and that the payment of premium and the option on premium default were "per annuity contract"; the bank president testified that he understood those answers to mean that the annuity contract—which contained no endorsements (Tr. 442)—was, as written, all-inclusive as to its terms (Tr. D–441). In fact, however, Clark had paid for the policies with a $100,000 premium note to Financial Security Life (Tr. D–237—D–238) and a $100,000 promissory note to Financial General Capital Corporation, another of petitioner's companies (Tr. D–245—D–246). He also executed a Reservation of Benefits and Proceeds rider which reduced the cash value of the policies by the amount of the unpaid balance of the premium note (Tr. D–240—D–243); the rider—which was not requested by Clark although stating on its face that it was (Tr. D–243—D–244)—was not attached to the policies or otherwise called to the bank's attention (Tr. D–442). When Clark defaulted on the loans, the bank retained counsel to attempt to collect on the policies. Counsel's inquiries to Financial Security Life were answered by a letter which for the first time revealed that the policies had been paid for by a premium note which had not been paid and that the cash surrender value of the policies was offset by the amount due on the note (Tr. E–14—E–15). The loans to Clark by the bank were never repaid (Tr. D–424) and were eventually charged off by the bank as uncollectable (Tr. D–425).

trolled to a publicly-held corporation in return for the controlling stock in that corporation, the stronger FSL's financial position appeared, the better opportunity petitioner would have to negotiate a favorable deal (Tr. F–17—F–20, F–25—F–29, J–268—J–269).

2. Edwin S. Newman, a lawyer who had been a close associate of petitioner and had been vice president of Financial Security Life Insurance Company and vice president of Financial General Capital Corporation, a related corporation also controlled by petitioner, was indicted along with petitioner and three others (App. 33–47). However, Newman's case was severed prior to trial, and he agreed to plead guilty to one count of the indictment, to furnish a complete

statement under oath concerning the events that were the subject of the indictment, and to testify as a government witness at petitioner's trial (App. 48–50).[3]

At trial, Newman was the last and primary witness for the government in its case-in-chief. Newman testified that he had either participated in or been present during all of the transactions that were the subjects of the indictment. He testified in detail concerning petitioner's operations at Financial Security Life and Financial General Capital and about the transactions involved in this case. He also corroborated the testimony of other government witnesses.

Specifically, Newman testified about the planning and execution of the scheme devised by petitioner. He described a meeting between himself, petitioner and William Skillman at which the annuity concept was developed, but he said he contributed nothing to the discussion at the meeting (Tr. K–305—K–306). Newman's function while he was employed by FSL was specifically to implement petitioner's instructions and decisions with whatever paperwork or detail work was required (Tr. J–234). He was therefore responsible for the paperwork necessary to issue the annuities and for the responses to lending institution inquiries (Tr. F–63, K–37, K–47, K–57, M–115—

[3] Petitioner makes much of the specific terms of Newman's plea bargain with the government (Br. 13–14, 54–57). However, since this Court did not grant the petition on the question argued by petitioner therein—whether he was denied due process by a failure of the government to reveal the full details of the plea arrangement—it is not open to petitioner to attempt to raise this question anew.

M–116). However, at no time during Newman's employment did he consider himself free to initiate independent courses of action on behalf of the company; his activities were always under the direct control of petitioner (Tr. J–235). Petitioner made very clear what he wanted done, and Newman was either to implement petitioner's ideas or leave the company (Tr. K–353).[4]

[4] The tone of the Goldberg-Newman relationship is reflected in a memorandum written by petitioner to Newman on December 7, 1966 (Gov't. Exhibit 32A). It read in pertinent part:

"Your original function was to implement *me*. This means that your work is done only in relationship to *me*.

"This does not eliminate your necessity for thinking and using your judgment, but it does strictly prohibit you from talking to anyone on my behalf without quoting the message, decision or judgment and mentioning that you are basing it on my precise thoughts to the individual. * * *

"Various people think that when you say something that this is coming from you and not from me and accordingly refuse to act on it. I want my opinion given and related as my opinion. You can give your own opinion 24 hours a day, but state that it is yours. It may be adamantly [*sic*] opposed to my opinion, but it can be given and should be given, but identified.

"All of the above applies to personal contacts, telephone and conferences."

* * * * *

"It is your responsibility, if you have an idea of how to handle a financial deal such as Marques (in FSL) for you to place a Memo to File with copies to the attorney handling FSL, copy to PJG [petitioner] marked Pending and Action, and any other appropriate person or file."

* * * * *

"Further, you will have a brief conference with me every morning on those items which you will work on that day, and only on completion and follow-up will you accept new areas.

"This in effect becomes a Procedural Manual for our relationship."

Thus, when petitioner was out of town he kept in daily telephone contact with Newman (Tr. K–268—K–269), and he required Newman to report back to him when Newman was away from the home office (Tr. J–191). Petitioner, unless out of town, personally opened all the incoming mail in the morning (Tr. K–243) and read all correspondence prepared by Newman and sent by or on behalf of his companies (Tr. N–327). For example, an answer to an inquiry from the First National Bank of Mason City, Iowa, was sent only after a note was directed to Newman saying that petitioner wanted to know how Newman intended to answer the inquiry, and after petitioner told Newman that he wanted the answer phrased in such a manner as to make it possible for money to be borrowed against the policies (Tr. K–36—K–37).[5]

Petitioner responded to Newman's resignation as a trustee of a trust fund for the benefit of petitioner's wife (see Tr. K–112—K–113) with a letter to Newman, dated May 25, 1969 (Gov't. Exhibit 32B), in which he said, *inter alia*:

> I am also very sorry about the newspaper publicity, particularly where FSL is involved and your name has been mentioned. I am totally responsible for everything that has happened in FSL and again, while I know that everything we did was legal, legitimate and in good faith, I

[5] At the time Newman wrote the letter, he knew that the policy had been paid for with the premium note, that the usual riders had been attached that rendered the policy in fact worthless as collateral, and that the policy was worth nothing in the hands of the bank (Tr. K–39—K–40). See also Tr. K–46—K–88.

> am deeply concerned that anything would wipe off on you.
>
> The entire annuity program was my concept, and you only did your job in implementing my decisions. If you feel that you want to take action in your own personal behalf to disassociate yourself from these matters, I will certainly understand.[6]

B. PETITIONER'S DEMAND FOR THE PROSECUTOR'S NOTES

1. During the government's case-in-chief, Newman testified for a week on direct and cross-examination. He was also the government's only rebuttal witness. Prior to trial, the government provided petitioner with copies of (1) an 89-page state-

[6] Petitioner's defense at trial was that he believed the annuity concept to be lawful and proper and that he relied upon his attorneys, including Edwin S. Newman, to insure the legitimacy of the program (see Br. 12). Newman, however, testified that he did not act as a lawyer for FSL or petitioner, that his legal abilities were rarely utilized by petitioner, and that he never had occasion to render legal advice on a continuing basis to either petitioner or the companies owned or controlled by the latter (Tr. J–231—J–234, K–153—K–154). Rather, as indicated, Newman's function was solely to implement petitioner's instructions (Tr. J–234, M–331—M–332). In this respect, he drafted position papers at petitioner's direction (Tr. K–211) and memoranda of meetings between petitioner and others (K–305); provided transportation on petitioner's behalf for other persons (Tr. D–230, F–13); wrote books, press releases and other such items for and in the name of petitioner (Tr. K–160, K–251—K–252); attended to and executed all necessary paperwork required to issue an insurance policy (Tr. F–63, J–178, M–115—M–116); communicated on petitioner's behalf with various attorneys (Tr. K–157, N–135—N–137); and initiated and answered correspondence relating to lender approval of loans collateralized by Financial Security Life annuity policies (Tr. K–37, K–47, K–67—K–69).

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ment that Newman had given to the prosecutors and a postal inspector, under oath before a court reporter, on May 11, 1973, eleven days before trial; (2) a 15-page memorandum of an interview of Newman by a postal inspector, three-and-one-half years prior to trial; and (3) a 54-page excerpt from the transcript of a grand jury proceeding in the Eastern District of Michigan, constituting all of Newman's testimony before the grand jury.

Petitioner's trial began on May 22, 1973, and concluded on July 14, 1973. On June 27, during cross-examination, Newman stated that, subsequent to giving his sworn statement on May 11, he had had a number of conferences with the prosecutors at which he went over the testimony that he would give at trial; he said the prosecutors had taken notes at these conferences (App. 90). The first such conference took place on May 13, nine days before trial (App. 91); subsequent to the commencement of trial, Newman had met with the prosecutors on June 9, 10, 16 and 17, and "portions of each day since" (App. 93). Newman was specifically asked about the duration of only the June 16 and June 17 conferences; he said that the first had lasted four to five hours and the second approximately six hours (*ibid.*).[7]

When asked if, during the May 13 conference, the prosecutors had "sometimes" questioned him about

[7] Later, during his appearance as a government rebuttal witness, Newman stated that he had spent an average of five hours each day at the prosecutors' office in the week since he had concluded his testimony during the government's case-in-chief (App. 110).

what he had just said to them to make sure that they had gotten it down correctly, Newman replied: "They may have. I don't really remember that that was part of the pattern" (App. 90–91). When subsequently asked if during the conferences on June 9 and 10 the notes were "occasionally read back" to him to see if the prosecutors correctly understood what he was saying, he replied "[p]robably from time to time" and acknowledged that it "would happen" that he would inform them whether their understanding of what he was saying was correct or incorrect (App. 92).

Petitioner's counsel thereupon moved for production of the notes under the Jencks Act, 18 U.S.C. 3500 (App. 93). The court responded: "Aren't these attorneys' work product, notes of interviews with witnesses, just like yours are?" (App. 94). The court denied petitioner's motion for production, without prejudice to reopening the matter if petitioner could provide "some authority for use of attorney's work product in interviewing a witness, with his impressions, plans, his strategy * * * when you have already got reduced to testimony a statement of the witness, that this attorney's notes in preparation for trial should be discoverable" (*ibid.*). Although petitioner subsequently renewed his motion in writing, he never provided the requested authority. See App. 97.

In the written renewal of his motion requesting production of the notes, petitioner relied upon both the Jencks Act and *Brady* v. *Maryland*, 373 U.S. 83 (App. 53–56). Alternatively, petitioner requested the court to order the notes produced for *in camera* inspection to

determine whether they were producible to the defense (App. 55). During oral argument on the motion, the court inquired: "These are notes made by a trial attorney in preparation for trial and interviewing a witness, aren't they? Is there any question about that?" Petitioner's counsel responded: "That is as I understand it" (App. 97). The prosecutor represented (App. 98):

> [T]hese were merely our notes which reflect substances of conversations, our impressions, certain entries that would be classified as trial strategy. They were not taken down verbatim. They were not shown to the people that we were interviewing. Nobody was asked to sign them in the form of a signed statement, and we feel that it is properly the work product of counsel and we would stand on that.

The court thereupon ruled that production of the notes was not required and denied the renewed motion (App. 99).

2. Denial of production of the notes was one of the issues raised by petitioner in the court of appeals. Although the notes had not been tendered to the district court and made part of the sealed record,[8] the notes were tendered to and accepted by the court of appeals for lodging. After examining the notes, the court of appeals found "no clear, prejudicial error" in the trial court's denial of petitioner's request for

[8] That procedure had been followed with respect to an unrelated set of notes for which a request for production was also denied (see Tr. I–287), and the prosecutor's initial recollection was that both sets of notes were handled in the same fashion.

production (App. 120). The court held that, "[a]part from the question whether such notes were exempt from the Jencks Act * * * as 'work product,' they were not statements of the defendant [*sic*, undoubtedly 'witness' was the word intended] within the meaning of § 3500(e)" (*ibid.*).

C. THE NATURE OF THE NOTES

The notes that were lodged with the court of appeals have been forwarded to this Court because their examination may aid a proper resolution of this case, as it did in the court below.[9] The lodging in the court of appeals consisted of a total of 237 pages

[9] The original and nine copies of the notes, which we have paginated for easier reference, have been sent to the Clerk of the Court; we also sent a paginated copy to petitioner prior to the filing of his brief. For comparison purposes, we are also lodging one copy each of Newman's 89-page sworn statement, the 15-page memorandum of the interview of Newman by a postal inspector, and the transcript of Newman's testimony before the grand jury in the Eastern District of Michigan, all of which were produced to petitioner prior to trial.

We are not, as petitioner suggests (Br. 25), simply lodging the notes with this Court. In our view, they became part of the record when they were lodged with the court of appeals. We merely arranged for the clerk of the court of appeals to forward the notes to this Court. Moreover, there is no basis in the record for any suggestion that the notes lodged with the court of appeals and forwarded to this Court are not all of the notes taken by the prosecutors at the conferences with Newman. Contrary to petitioner's assertion (Br. 3, 25, 29, 45), the prosecutor did not describe what he was lodging with the court of appeals as "all the notes he could then find;" rather he stated that he was lodging "all of the notes." The prosecutor has executed a sworn affidavit, which we are filing with this brief, that the complete notes were lodged and that he so advised the court of appeals.

of notes;[10] these included not only the notes in the handwriting of the prosecutors, which were the subject of petitioner's production request at trial, but also certain notes in the handwriting of Newman himself.[11]

The notes of the prosecutors, most of which were made on white or yellow lined legal-size paper, are of three general types:

1. 135 pages of the notes (pages 2–17, 20–63, 148–207, 209–223) consist of notations, often in outline form, which mix together factual material, questions, and ideas for trial strategy. These pages contain cryptic jottings, underlinings, interlineations, cross-references, arrows, doodles and marginal notations.

2. 58 pages of the notes (pages 64–97, 102–125) consist of questions prepared by the prosecutors to use in cross-examination of petitioner.

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[10] We have numbered the pages 1 through 238 and refer to the pages by number throughout this brief. The first page is a cover page containing the case name and number and the date on which the document was lodged with the court of appeals.

[11] We advised counsel for petitioner prior to the time he filed his brief in this Court that we had discovered that some of the notes were in fact written by Newman rather than by the prosecutors. We have been informed that pages 2–17, 20–40, 43–97, 102–125, 148–186, 192–193, 196–198, 207, 209–210, 213–215, and 217–223 were written by then Assistant United States Attorney Ronald A. Lebowitz; pages 41–42, 187–190, 199–206, 211–212 and 216 were written by Assistant United States Attorney Joseph Raymond Keilp; and pages 18–19, 126–147, 208 and 224–238 were written by Newman himself. Pages 191 and 194–195 were typewritten by prosecutor Lebowitz, and pages 98–101 are photocopies of pages from the trial transcript.

3. Four pages (pages 98–101) are photocopies of pages from the trial transcript.[12]

An examination of the prosecutors' notes fully supports the characterization made by the government in the court of appeals concerning the prosecutors' conferences with Newman and the nature of the notes resulting therefrom (Gov't. Ct. App. Br. 63–64):

> * * * Edwin Newman met and conferred with government attorneys on numerous oc-

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[12] The notes written by Newman himself present issues not directly encompassed within the Court's certiorari grant. These issues are discussed in Part II of our argument, *infra*, pp. ~~64–71.~~ 65-72

The notes in Newman's handwriting are of five general types:

1. 22 pages consist of essentially legal advice given by Newman, a lawyer, to the prosecutors. Two pages (pages 18–19), contain an outline suggesting to the prosecutors how they should present their case to the jury. 20 pages (pages 126–129, 131–146) are questions suggested by Newman for the prosecutors' use in cross-examining petitioner.

2. Three pages (pages 130, 229–230) are accounting analyses.

3. Three pages contain factual information relating to petitioner. Page 147 is a dated chronology of events in outline form, some entries being no more than a word or two or an abbreviation; and pages 228 and 231 are cryptic notes.

4. Five pages contain material relating solely and specifically to witness Paradine, who testified for both the government and petitioner. Paradine was a former state insurance investigator (and subsequently an employee of petitioner) who had reviewed the assets of Financial Security Life Insurance Company and prepared a report thereon. One page (page 208) is an analysis of information that could be developed on cross-examination of Paradine, and four pages (pages 224–227) contain an analysis, with page references, of the official report prepared by Paradine.

5. Seven pages (pages 232–238) are a narrative statement relating to the activities of Paradine and his contacts with both Newman and petitioner.

casions. Each of these conferences consumed several hours of conversation and in excess of 40 total hours were spent. * * *

* * * * *

Newman, in fact, did far more than answer questions. He helped the government attorneys in drafting questions to be asked of him and of other witnesses. He helped suggest certain areas of cross-examination to be covered in the event that Goldberg ultimately testified. He explained or made sense out of an almost endless number of letters, documents and other pieces of physical evidence. In many respects, Newman effectively educated the prosecution in the short time available as to the significance of the every day operations of FSL, as well as providing invaluable insight into the personality and past history of Philip Goldberg.

* * * These entries were often prepared only after lengthy conversations had occurred and a mutual understanding of the factual situations had been reached. They were not written to preserve testimony, nor do they ever reflect the complex degree of conversation which preceeded their recordation. Rather, they were prepared to aid the examining attorney in formulating his questions during the trial itself.

Furthermore, an in-camera inspection of the notes will reveal that the entries appearing thereon are not sufficiently comprehensible to be used for impeachment purposes. The entries lack sufficient specificity as to time, place and parties to confront a witness with the appropriate subject matter required for a foundation to use prior inconsistent statements, if any.

SUMMARY OF ARGUMENT

1. The primary issue in this case is whether the government trial attorneys' notes of conversations with a government witness, prepared by the prosecutors to enable them adequately to present the government's case before the jury, are the kind of witness "statements" contemplated by the Jencks Act.

It is our position that there is no broad or absolute "attorney's work product exception" to the Jencks Act as such, but that the Act's narrow definition of the term "statement" reflects a congressional recognition of principles underlying the work product doctrine. For example, the 89-page narrative statement given by Newman on May 11 (see p. 11, *supra*)—while generated by the prosecutors in connection with their trial preparation and thus arguably their "work product"—was, in our view, producible under the Act. Material of this type may be viewed as truly a statement *of the witness,* which, almost inevitably, does not contain the mental impressions, ideas for trial strategy or personal beliefs of the attorney. In general, however, an attorney's notes of witness interviews will not be "statements" within the meaning of the Jencks Act.

In enacting the Jencks Act, Congress defined the term "statement" narrowly and limited production to two types of statements: "a written statement made by said witness and signed or otherwise adopted or approved by him" (18 U.S.C. 3500(e)(1)), and "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially

verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement" (18 U.S.C. (1964 ed.) 3500(e)(2)).[13] As this Court has recognized, such limited definitions were adopted because it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." *Palermo* v. *United States,* 360 U.S. 343, 350. In light of the congressional intent, it would be incongruous if prosecutors' interview notes generally, as exemplified by those in the record in this case, were considered "statements" within the meaning of the Jencks Act.

When witness statements are taken by an attorney in preparation for trial, principles underlying the work product doctrine support the congressional judgment to define "statement" narrowly. Unlike the investigative agent who interviews a witness during an investigation, the attorney is not seeking all the facts relating to the events in question; he has no need to take down the witness's statement in a cohesive, chronological fashion for eventual use by others. The information the lawyer seeks is for his own immediate use at trial, and his recordation of information therefore reflects his strategy as to how best to present his evidence, how the potential testimony of the witness he

[13] The language "to an agent of the government" was deleted when the Jencks Act was amended in 1970. See p. 51, n. 32, *infra.*

is interviewing correlates with other evidence, and how the testimony of the witness fits into the lawyer's theory of the case and understanding of the governing law. He does not verify with the witness the language he has in his notes. Thus, the notes taken by the lawyer are by their nature not the witness's own words taken down in a context that is reliable for use in cross-examination for impeachment.

While an investigator's report is normally a typed document in narrative form, a lawyer's notes are almost always handwritten, often abbreviated and perhaps illegible; if their production is compelled, the lawyer will be hard put to avoid testifying as to their meaning. Moreover, since the attorney's notes will often be in his own cryptic language, there are bound to be verbal inconsistencies between them and the witness's testimony. If the witness denies having made the statement contained in the notes, opposing counsel may call the note-taker to the stand; or the attorney himself may feel the need to testify to explain to the jury the meaning of the notes or, if his own credibility is called into question, to contradict his own witness.

We suggest that these problems can be avoided by defining the term "statement" strictly where lawyers' notes are involved, as Congress intended. Indeed, a review of the legislative history of the Jencks Act itself supports the view that Congress intended to shield prosecutors' trial preparation notes from production.

Petitioner urges a far broader definition of producible statements under the Jencks Act, under which virtually any writing whose contents (or a portion of whose contents) have been disclosed to the witness and the general correctness of which the witness has verified would be deemed a prior written statement of the witness under 18 U.S.C. 3500(e)(1) as "otherwise adopted or approved." We submit that, if the Court feels unable to reject petitioner's definition of "statement" on this record, sound decision-making requires a remand to the district court to obtain answers to a significant number of unanswered factual questions that must serve as the predicate for any promulgation of standards regarding the meaning of "adopted or approved." (If, on the other hand, the Court adopts our position, no such remand would be required, since it is already clear from the record that the prosecutors' notes do not constitute producible statements under the standards we propose.)

Finally, petitioner's reliance on *Campbell* v. *United States,* 373 U.S. 487 (*"Campbell II"*), is misplaced. Not only are there significant distinctions between the facts of this case and the facts that were before the Court in *Campbell II,* but the extension of that case that petitioner urges would be a sharp departure from the congressional intention strictly to limit the kind of statements producible under the Jencks Act. Moreover, because of the differences in purpose between the note-taking of a lawyer and the note-taking of an investigator, we seriously question whether *Campbell II* ought ever to be applied to an attorney's notes as opposed to an investigator's report, which is what was involved in *Campbell.*

2. The petition for a writ of certiorari was granted to consider whether the Jencks Act contains an "attorney's work product exception" that makes non-producible an attorney's notes of conversations with a witness. However, included among the notes in the prosecutors' files in this case were 40 pages of material written by the witness Newman himself. It appears that the question of the producibility of those notes is beyond the scope of the grant and turns upon different considerations.

However, while we recognize that petitioner may have been unaware of the Newman notes at the time he filed the petition, it seems clear from simple inspection of the notes and review of the course of events at trial that there is little in them that was even arguably producible. Accordingly, this Court, if it reaches the question, may affirm the judgment of the court of appeals as to these notes. On the other hand, since it is not clear that the court of appeals was aware that some of the notes lodged with it were written by Newman, this Court may wish to remand for further consideration of this issue.

3. The notes of the government trial attorneys and of the government witness were not producible under either the Fifth or the Sixth Amendment to the Constitution.

Brady v. *Maryland,* 373 U.S. 83, and *Moore* v. *Illinois,* 408 U.S. 786, do not require, as petitioner argues, the production of any materials that are not tech-

nically Jencks Act statements but that nevertheless might be helpful for impeachment purposes. Were *Brady* so read, there would be nothing left of the carefully constructed Jencks Act, with its limited definition of "statement," for all materials, whether or not statements under the Jencks Act, would become producible under *Brady* because possibly helpful in attacking a witness's credibility.

Nor has petitioner demonstrated a violation of the Sixth Amendment's Confrontation or Compulsory Process Clauses. Neither the unrestricted right of cross-examination, to which he refers, nor the right to subpoena witnesses and documents carries with it a right to obtain material from government files not otherwise producible either under the Jencks Act or by virtue of the due process considerations recognized by *Brady*.

ARGUMENT

I. THE JENCKS ACT DOES NOT CONTAIN A BROAD "ATTORNEY'S WORK PRODUCT EXCEPTION" AS SUCH, BUT THE ACT'S NARROW DEFINITION OF "STATEMENT" REFLECTS PRINCIPLES UNDERLYING THE WORK PRODUCT DOCTRINE AND, WITH RARE EXCEPTIONS, PROTECTS ATTORNEYS' NOTES FROM PRODUCTION

In *Jencks* v. *United States*, 353 U.S. 657, this Court recognized the discretion of trial courts to order the prosecution to disclose to the defense statements made by government witnesses, and recorded by investigative agents of the government, touching upon the events and activities as to which the witnesses testified at trial; it said that the defense is entitled to inspect

such statements to determine whether they would be helpful in cross-examination to impeach the testimony of the government witnesses (353 U.S. at 668–669).[14] However, the discretion recognized by the Court in *Jencks* was subsequently limited by Congress in the so-called Jencks Act, 18 U.S.C. 3500. See S. Rep. No. 981, 85th Cong., 1st Sess. 2–4 (1957). The Act provides that after a government witness has testified on direct examination, "the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified" (18 U.S.C. 3500(b)).

The Act defines the term "statement" narrowly and provides for production to the defense of only those statements specified therein. *Palermo* v. *United States*, 360 U.S. 343, 349–351.[15] To be producible under the Act, a statement must either be "a written statement made by said witness and signed or otherwise adopted or approved by him" (18 U.S.C. 3500 (e)(1)) or "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral state-

[14] The Court has recently recognized the same inherent power in the trial courts to order the defense to produce witness statements to the prosecution, in order to facilitate full disclosure of all relevant facts. *United States* v. *Nobles*, No. 74–634, decided June 23, 1975.

[15] Absent constitutional requirements, the Jencks Act is the exclusive mechanism for the production of statements by the prosecution to the defense. *Palermo* v. *United States*, *supra*, 360 U.S. at 351.

ment made by said witness and recorded contemporaneously with the making of such oral statement" (18 U.S.C. 3500(e)(2)).[16] By so restricting the definition of the type of statement to be produced, Congress expressed its intent that "only those statements which could properly be considered the witness' own words should be made available to the defense for purposes of impeachment." *Palermo* v. *United States, supra,* 360 U.S. at 352.

The primary issue in this case is whether the government trial attorneys' notes of conversations with a government witness, prepared by the prosecutors to enable them adequately to present the government's case before the jury, are the kind of witness "statement" contemplated by the Jencks Act. In a sense, however, the foregoing is an unduly narrow delineation of the issue before the Court. While this case happens to involve notes taken by a prosecutor, the considerations guiding its decision would bear with equal weight upon the question of the power of the trial court to order production of a defense attorney's notes. This is so because any claim that an attorney's notes are producible is necessarily rooted in the notion that the producible portions are in reality the *witness's* statement, without significant admixture of the attorney's personal and professional input. If such

[16] A third type of statement, not relevant here, was added to the Jencks Act definition of "statement" by a 1970 amendment to the Act. Now included within the definition is "a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury" (18 U.S.C. 3500(e)(3)). See Pub. L. 91–452, Title I, Section 102, 84 Stat. 926.

material is not sheltered by policies, relating to the right of a party to the unfettered aid of counsel, that apply equally whether the party be defendant or government, then it is hard to discern a basis for disparate treatment when it is the defense attorney's notes rather than those of the prosecutor that contain the prior statement of the witness. Cf. *United States* v. *Nobles,* No. 74–634, decided June 23, 1975, slip op., pp. 5–7.[17]

A. THERE IS NO BROAD OR ABSOLUTE "WORK PRODUCT" EXCEPTION BARRING DISCLOSURE OF WITNESS STATEMENTS SIMPLY BECAUSE THEY HAVE BEEN GENERATED BY AN ATTORNEY IN THE COURSE OF TRIAL PREPARATION

We believe that there is no broad attorney's work-product exception to the Jencks Act that shelters statements relating to the subject matter of the testimony of a witness merely because the statements were obtained by a government attorney rather than a government investigator. For if what is involved is truly the statement of the *witness*—that is, a statement written and signed or otherwise formally adopted or approved by him or a substantially verbatim recording of an oral statement—by definition

[17] This is not to say, of course, that the rights and duties of prosecutor and defense counsel are identical in a criminal case. Thus, the prosecutor is under an affirmative duty to disclose exculpatory evidence to the defense, while defense counsel has no analogous obligation with respect to inculpatory information. Moreover, defense counsel may have broader leeway to utilize testimony of doubted veracity than the prosecution has. But these areas of legitimate distinction implicate wholly different policies from the question of the producibility of prior witness statements, and we submit that principles of reciprocity would properly control the latter.

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it does not contain the mental impressions, trial strategy or personal beliefs of an attorney. Such material thus implicates only tangentially, if at all, the policies underpinning the work product doctrine.

Thus, in the event that a government trial attorney, during the course of a witness conference in preparation for trial, tape records or stenographically transcribes the witness's narrative account of certain events, the tape recording, "or a transcription thereof," would constitute "a substantially verbatim recital of an oral statement made by [the] witness **and recorded contemporaneously with the making of** such oral statement" within the meaning of 18 U.S.C. 3500(e)(2). It would therefore be producible under the Jencks Act, and we do not urge upon the Court a contrary view in the case where the statement is obtained by a government trial attorney in preparation for trial rather than by an F.B.I. agent or other law enforcement officer during an investigation.

Similarly, if the witness writes out a narrative statement of certain events in his own handwriting, such a statement would constitute "a written statement made by said witness and signed or otherwise adopted or approved by him" within the meaning of 18 U.S.C. 3500(e)(1). As we discuss in Part II, pp. 66–67, *infra,* seven pages of the notes handwritten by Newman in this case appear to be precisely that kind of statement. Upon proper demand and if it related to the witness's testimony on direct examination, such a statement would be producible under the Jencks Act. Finally, if, during a witness

conference in preparation for trial, the witness dictates a narrative statement to the government trial attorney, the attorney takes down the statement of the witness word-for-word and then either reads the statement back to him word-for-word or allows the witness to read the statement, and the witness signs the statement, initials it, or otherwise formally adopts it as his own or approves the language as correct, the statement would constitute a producible written statement within the meaning of 18 U.S.C. 3500(e)(1).

A true witness statement of the foregoing sort is unlikely to be generated by an attorney interviewing a witness in preparation for trial, because his purpose in taking notes is not to record the witness's narrative account of the facts but to further his own understanding of the case and to provide himself with written aids for use at trial. Moreover, because of this purpose, the attorney's notes will almost always contain his mental impressions, ideas for trial strategy and the like, and they are generally not shown to the witness and adopted or approved by him in any formal way. Thus, the examples we give set the outer limits of the kind of material in prosecutors' files that we believe Congress intended to include within its narrow definition of the term "statement."

Because Congress was concerned that government trial attorney's notes not be subject to routine inspection, we submit that any notes of the trial attorney other than those illustrated by the foregoing examples simply are not "statements" within the meaning of the

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Jencks Act. They are therefore not producible under the Act, and, in our view, there is no need for either an evidentiary hearing on the nature of the notes or an *in camera* inspection by the trial judge to determine whether they are statements within the meaning of the statute. The attorney's representation in open court that the notes were neither substantially verbatim, written by the witness in his own hand or dictated by the witness and then signed, initialed or adopted or approved by the witness in some formal way, is sufficient to bar production.

B. BY DEFINING THE TERM "STATEMENT" NARROWLY, CONGRESS INTENDED THAT ONLY THE WITNESS'S OWN WORDS BE PRODUCED FOR PURPOSES OF IMPEACHMENT

1. The *Jencks* decision secured to defendants the right to receive witness statements if they might possibly be useful on cross-examination to discredit a witness's testimony. The Court in *Jencks* rejected the requirement of a showing that a particular statement is inconsistent with the witness's trial testimony as a precondition to its production (353 U.S. at 668–669) and concluded that "[r]elevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness" (*id.* at 669). The Court stated (*id.* at 667):

> Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency.

> The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

In short, *Jencks* held that a defendant is entitled to the production of statements, if they exist and are in the possession of the government, that will enable him to test the precise language of the witness's trial testimony against whatever the witness has previously said on the same subject.

But to the extent that a witness's language on the witness stand is to be compared with his prior language on the same subject for "omission[s]", "contrast[s] in emphasis" or even "a different order of treatment"—if impeachment is to be attempted by showing subtle differences in language or barely perceptible shadings in approach—it should be the witness's own prior language to which the comparison is made. The veracity of a witness's testimony could not be properly questioned on the basis of subtle differences or barely perceptible shadings whose source was someone other than himself. The theory of the *Jencks* case therefore requires limiting production to materials that in fact reflect what the witness actually said, as opposed to materials that merely reflect second party accounts that summarize, interpret, or otherwise alter the witness's actual words.

Congress accepted this underlying premise of the *Jencks* case when it enacted the Jencks Act. It in-

tended by the legislation to require disclosure only of "an authenticated statement or report by the witness having to do with the activities of the defendant" (S. Rep. No. 981, 85th Cong., 1st Sess. 5 (1957)); and it was specifically concerned that "summaries of oral statements made by [a witness] * * * which the witness had never seen or in any way approved" not be disclosed (H.R. Rep. No. 700, 85th Cong., 1st Sess. 5–6 (1957)). For Congress believed that "the credibility of a witness cannot be impeached by using a statement that the witness has never seen and never approved and which was prepared by someone else" (*id.* at 6).[18]

Thus, Congress limited producible "statements" under the Jencks Act to those that meet either of two definitions. The first statutory definition is "a written statement made by said witness and signed or otherwise adopted or approved by him" (18 U.S.C. 3500(e)(1)). As an alternative, which "widens the definition of 'statement'" (*Palermo* v. *United States, supra,* 360 U.S. at 351), Congress provided for the production of "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement" (18 U.S.C. (1964 ed.) 3500(e)(2)). As

[18] Senator Kuchel's remarks during the Senate debate are typical of the concern expressed: "* * * I think the ends of justice require the Congress, in determining the procedures in such a case, to clothe the witness, as against the defendant, with some protection, so that the witness will not have thrown at him records which are not agreed to be the witness' statements." 103 Cong. Rec. 15932 (1957).

this Court discerned the congressional meaning, such a limited definition of "statement" was adopted because it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selection, interpretations and interpolations." *Palermo* v. *United States, supra,* 360 U.S. at 350. "It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." *Id.* at 352.

2. As to written statements, Congress required the production of "a written statement made by said witness and signed or otherwise adopted or approved by him" (18 U.S.C. 3500(e)(1)). As this Court has said about that subsection, "[a]lthough some situations may arise creating peripheral problems of construction, its import is clear." *Palermo* v. *United States, supra,* 360 U.S. at 351.

On the floor of the House, Congressman Yates asked if the House version would permit examination of only a written report.[19] Congressman Keating,

[19] The House version of the bill defined statement as such "reports or statements of the witness in the possession of the United States as are signed by the witness, or otherwise adopted or approved by him as correct, relating to the subject matter as to which he has testified." See H.R. 7915, Section 3500(b), 85th Cong., 1st Sess. (1957), quoted in H.R. Rep. No. 700, *supra,* at 1. It is to this form of "statement" that this legislative history refers. Substantially verbatim oral statements were added to the definition of "statement" in conference.

one of the managers of the bill on the part of the House and a member of the Senate-House Conference Committee, replied that, in his opinion and in the opinion of the Attorney General, the *Jencks* case held only that the Government would have to produce statements which had been "identified and approved in some formal way" by the witness, "either signed by him, initialed by him, or taken down in a question-and-answer form and then approved by him." 103 Cong. Rec. 16119 (1957). See also S. Rep. No. 981, *supra,* at 5 (the term "statement" means "an authenticated statement or report by the witness"); 103 Cong. Rec. 16739 (1957) ("only statements * * * actually signed or formally approved by the witness") (remarks of Representative Keating).

Thus, the definition of "statement" found in 18 U.S.C. 3500(e)(1) means a statement actually written by the witness or a statement dictated by the witness and written by another or taken down by another in a question-and-answer form.[20] Unless actually written by the witness, the statement, to be within subsection (e)(1), must have been read by the witness and signed, or at least initialed or in some other formal way adopted or approved by him as correct. Where the statute says "signed, or otherwise adopted or approved," the legislative history indicates it means an approval or adoption comparable to a signature, and it refers to adoption or approval of the written statement itself,

[20] The 89-page statement that Newman gave to the prosecutors under oath before a court reporter, on May 11, 1973, is an example of this last type of written statement.

not merely the approval of a general account of which the writing may be representative. Where there is no formal verification from the witness that the statement is correct, such an unverified and unauthenticated writing is not a written statement within the meaning of 18 U.S.C. 3500(e)(1). See H.R. Rep. No. 700, *supra*, at 5.[21]

As to oral statements, Congress was unmistakably of the view that nonverbatim summaries are not to be treated as the statements of the witness, and that a witness should not be impeached by a statement that is not his own. The only products of oral interviews that Congress was willing to accept were those that could be equated to an electrical transcription, being both "substantially verbatim" and "recorded contemporaneously." In agreeing upon the definition for "oral statements" in 18 U.S.C. 3500(e)(2), the House-Senate conferees believed that their definition was

[21] There is some indication in the legislative history that a summary of an interview also may become a "written statement" of the witness, but only if the summary is adopted and approved by the witness as correct and made a matter of record. See H.R. Rep. No. 700, *supra*, at 6. However, the House made reference to such summaries before the Conference added a provision for production of oral statements, but only those that are substantially verbatim. It is therefore unlikely that summaries of oral statements, even if formally adopted or approved, are producible under the Act. In any event, the considerations that may have led the House to suggest production of summaries of interviews conducted by F.B.I. and other law enforcement agents, if adopted or approved, are not relevant to notes taken by government trial attorneys. For, as we show below, the government trial attorney has very different purposes in mind, and the results of his interview are very different kinds of notes.

"in line with the standard enunciated by Judge George H. Moore of the [E]astern [D]istrict of Missouri * * * in *U.S.* v. *Anderson, et al.*" H.R. Conf. Rep. No. 1271, 85th Cong., 1st Sess. 3 (1957). In *Anderson,* Judge Moore had indicated that a statement of a witness under the *Jencks* decision, if not actually written by the witness himself, includes "only continuous, narrative statements made by the witness recorded verbatim, or nearly so," and does not include notes made during an interview "which contain the subjective impressions, opinions or conclusions" of the person making the notes. *United States* v. *Anderson,* 154 F. Supp. 374, 375 (E.D. Mo.); see also 103 Cong. Rec. 15940 (1957). Thus, for an oral statement to be producible under the Jencks Act, there must be no question that it contains the words of the witness himself in narrative form, recorded substantially verbatim contemporaneously with the making of the statement.

3. In light of the foregoing, it would be incongruous indeed if prosecutors' notes were considered either "written statements" or "oral statements" of the witness within the meaning of the Jencks Act, except where—as in the three examples we cited at the outset—they are clearly the witness's own words. An examination of the notes written by the prosecutors in this case fully supports this view.[22]

Four pages of material contained in the notes lodged with the Clerk (pages 98–101) are photocopies of pages from the trial transcript. These are not

[22] We deal separately with the notes handwritten by Newman himself. See Part II, pp. 6[illegible]-72 *infra.*

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Newman's statements at all but are part of the examination at trial of the witness Paradine by prosecutor Keilp. In any event, the transcript pages were equally as available to petitioner as to the goverment. Nor are the 58 pages of questions, written by the prosecutors for use in cross-examining petitioner (pages 64–97, 102–125) "statements" of Newman within the meaning of the Jencks Act. An examination of these pages demonstrates that they are not factual statements in Newman's words, but questions fashioned by the prosecutors after talking to Newman that could be used to cross-examine petitioner. It would obviously be unfair to use such questions to impeach Newman's testimony.

As for the remaining 135 pages of notes written by the prosecutors during conferences with Newman (pages 2–17, 20–63, 148–207, 209–223), it is apparent on their face that they are not coherent narrative statements dictated by Newman or taken down by the prosecutors in a question-and-answer form, and then signed, initialed or in any formal way adopted as Newman's own or approved by him as correct. These pages contain the prosecutors' cryptic jottings, interlineations, cross-references, arrows, doodles and marginal notations, and were obviously designed only to aid the prosecutors' memory in preparing for trial and in formulating questions at trial. An examination of the notes shows that they do not reflect fully and without distortion what Newman said to the prosecutors. Rather, they mix together factual material, questions and ideas for trial strategy, and are therefore just the kind of non-verbatim summaries of

oral statements intended by Congress to be excluded from production under the Jencks Act. See *Palermo* v. *United States, supra,* 360 U.S. at 350, 352–353.[23] Thus, the notes are not Newman's "written statements" under 18 U.S.C. 3500(e)(1),[24] and were therefore not producible under the Jencks Act.[25]

[23] The fact that at least 40 hours of conferences yielded so few pages of notes is itself an indication that the notes are merely summaries "which evidence substantial selection of material" by the prosecutors. *Palermo* v. *United States, supra,* 360 U.S. at 352–353.

[24] Petitioner and *amici* do not claim that the prosecutors' notes constitute a substantially verbatim recital of what Newman said during the trial preparation conferences, within the meaning of 18 U.S.C. 3500(e)(2), but rather that the notes were written statements "adopted or approved" by Newman, within the meaning of 18 U.S.C. 3500(e)(1). See Pet. Br. 30, 41–42; Am. Br. 3, 5–12.

[25] Beyond the question whether the notes constitute Newman's "statements," rather than statements of the prosecutors, it seems that the present record does not support petitioner's assertion that they were "adopted or approved" within the meaning of Section 3500(e)(1). While petitioner now claims that the notes were read back to Newman "periodically" (Br. 28, 41)—thereby conveying the impression that all of the notes were systematically read to and approved by the witness—petitioner asked Newman during trial only if the notes were read back "sometimes" (App. 90) and "occasionally" (App. 92); Newman responded, and petitioner accepted the answer, "[p]robably from time to time" (*ibid.*). Moreover, his response referred only to the notes taken on June 9 and 10, 1973, not those taken on the many other days he met with the prosecutors. It is doubtful whether the facts concerning adoption or approval would change at a remand hearing. Indeed, it may be significant that petitioner—although not prevented by the district court from doing so—did not lay a firmer foundation for his contention that Newman "adopted or approved" the prosecutors' notes. See App. 90–93. The inadequacy of the present record to establish adoption by the witness is further discussed at pp. 54–58, *infra.*

C. WHEN WITNESS STATEMENTS ARE TAKEN BY AN ATTORNEY IN PREPARATION FOR TRIAL, PRINCIPLES UNDERLYING THE WORK PRODUCT DOCTRINE SUPPORT THE CONGRESSIONAL JUDGMENT TO DEFINE "STATEMENT" NARROWLY

1. Work Product Principles Are Implicated Because of the Nature of an Attorney's Trial Preparation Notes and the Purpose for Which They Are Prepared

The work product doctrine was recognized by this Court in the landmark case of *Hickman* v. *Taylor,* 329 U.S. 495, and it is now codified for civil cases in Rule 26(b)(3) of the Federal Rules of Civil Procedure.[26] It was determined in *United States* v. *Nobles,* No. 74–634, decided June 23, 1975, slip op., p. 11, that the "doctrine applies to criminal litigation as well as civil * * *."

The work product doctrine affords a qualified and limited protection for trial preparation materials in the attorney's file that reflect his mental impressions, personal beliefs, trial strategy, legal opinions and conclusions, and the like.[27] The doctrine recognizes that "it is essential that a lawyer work with a certain

[26] Rule 26(b)(3) states that in ordering discovery of trial preparation materials, the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Rule 16 (b) and (c), Fed. R. Crim. P., and Rule 16 (a)(2) and (b)(2), Fed. R. Crim. P. (as amended, effective December 1, 1975), state only that the rule does not authorize the pre-trial discovery of "reports, memoranda, or other internal * * * documents" by either the government or the defense. See H.R. Conf. Rep. No. 94–414, 94th Cong., 1st Sess., 12 (1975).

[27] See generally *United States* v. *Nobles, supra,* slip op., pp. 11–14; *Hickman* v. *Taylor, supra,* 329 U.S. at 508–514, 514–519 (Jackson, J., concurring); McCormick, *Evidence* § 96, pp. 204–209 (2d ed. 1972); 8 Wright and Miller, *Federal Practice and Procedure* § 2025 (1970).

degree of privacy" while acting for his client in anticipation of litigation and that the "[p]roper preparation of a client's case demands that [the trial attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman* v. *Taylor, supra,* 329 U.S. at 510–511. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States* v. *Nobles, supra,* slip op., p. 13. "Moreover, the concerns reflected in the work product doctrine do not disappear once trial has begun." *Ibid.*

The considerations underlying the work product doctrine are particularly pertinent in the case of witness interview notes taken by a lawyer in preparation for trial. Unlike the F.B.I. agent or defense investigator who interviews a witness during an investigation, the attorney in conferring with the witness in preparation for trial is not seeking the broad outlines of what happened; he normally has that information in the agent's reports. He is not concerned, as is the agent, with taking down a witness's statement in a cohesive, chronological fashion for eventual use by others. Nor is he concerned with recording the witness's recollections some considerable period in advance of a trial. The information the lawyer seeks is for his own immediate use at trial, and the order in which he records the facts and events discussed necessarily reflects his strategy as to how best to present his evidence at trial. Cf. *United States* v. *Aviles,* 337

F. 2d 552, 559 (C.A. 2). The goal is to determine precisely what facts a particular witness is competent to testify to, whether the testimony he can give is relevant and material under the rules of evidence that will govern the trial, how the potential testimony correlates with other evidence, and how the testimony of the witness fits into the lawyer's theory of the case and understanding of the governing law.[28]

[28] An investigating law enforcement agent (or a defense investigator, in most instances) has entirely different purposes in mind when he interviews potential witnesses during the investigatory stage of a case. As a result, his notes are more clearly witness "statements," are less likely to include the mental impressions and personal beliefs of the agent, and do not contain suggestions for trial strategy or legal analysis. For the agent is engaged in the investigation of facts; he is trying to find out what happened and to record the statements of the witness describing what he knows. The agent therefore seeks to uncover all the information that he can having any possible bearing on the case. See H.R. Rep. No. 700, *supra*, at 6.

The agent is after "raw" data; it will be sorted out later, when the pieces of the puzzle are put together and a theory is developed as to what actually occurred. Moreover, the information which he seeks is primarily for the use of others besides himself. Putting the pieces of the puzzle together is invariably a collective effort, and hence the information which he develops must be as complete as possible so that it can be passed on in a comprehensive fashion to the other agents involved in the effort, and ultimately to the prosecutors in order that a prosecutive determination may be made. The information will be further reviewed and studied by the trial prosecutor in order to familiarize himself with the case and make a preliminary determination concerning what evidence is available for presentation at trial.

The agent thus has a reason to make his report as full and detailed as possible. Agents' reports in many instances contain statements, signed or otherwise, which have been written or dictated by witnesses who have been interviewed. Where such statements are lacking and the agent merely reports what the witness said when interviewed, the witness is often quoted substantially verbatim.

Accordingly, the notes taken by the prosecutor are by their nature not the witness's own words taken down in a context that is reliable for use in cross-examination for impeachment. They necessarily reflect trial strategy, legal theories and mental impressions, for they are largely reminders to the lawyer to make sure that no useful area of questioning is overlooked when the witness is on the stand. Such note-taking for the purpose of personal recollection, as we know from common experience, is a highly individualistic matter substantially affected by the habits, particular practice, intellect, and psychological make-up of the note-taker. The notes may take the form (as various entries did in this case) of chronologies, topic headings, cryptic notations, questions, or short conclusory statements, and will often include (again as they did in this case) marginal strategy notations, interlineations, arrows and doodles.[29] Such notes, when tied to the subjective thought processes of the note-taker, will be helpful in aiding him to recall past events but will often be incomprehensible to others—including the witness whose interview led to creation of the notes.[30]

[29] The ABA Standards recognize a "work product" exception for the prosecuting attorney and his staff. ABA Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 2.6(a) (Approved Draft 1970). Among the material protected from disclosure are "notes or outlines of trial strategy * * * and of questions to be asked witnesses * * *" (Commentary to § 2.6, p. 91).

[30] The Second Circuit has recognized that prosecutors' notes, unlike notes taken by F.B.I. or other investigative agents, do not normally reflect the witness's own words and should not be produced for purposes of impeachment. Thus, in *United States* v. *Aviles*, *supra*, 337 F.2d at 559, the court said:

"* * * It would have been grossly unfair to allow the defense on cross-examination to confront Cantellops with the Shaw notes as if they were his own statements. Although courts should show the greatest liberality in making available to the defense any writing which represents what the witness may have said, they must also be meticulous in satisfying themselves that what is made available truly represents the witness' own statements. On the specific facts here presented the latter requirement has not been met.

"Moreover, the inference that government agents are accurate recorders of witnesses' statements is inapplicable in this case. It was not Shaw's aim to provide a record of Cantellops' story, but to draft for his own use a chronological statement which would serve, as well, as a guide in interrogating Cantellops before a grand jury."

See also *United States* v. *Myerson*, 368 F.2d 393, 395–396 (C.A. 2), where the court ruled that 20 pages of "witness sheets"—papers prepared by the government containing the witness's anticipated testimony that were reviewed by the witness before taking the stand—were not statements within the meaning of either subsection (1) or (2) of 18 U.S.C. 3500(e).

These distinctions between the trial attorney's purpose and manner of taking notes and the investigating agent's purpose and manner are significant. The agent is assembling facts with as much precision as possible while the events to which the witness's statement relates are relatively fresh in his mind. See n. 28, *supra*. Indeed, one of the foundations of this Court's decision in *Jencks* was the fact that the agent had recorded the witness's statements close in time to the events in question. As the Court stated: "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events *before time dulls treacherous memory*." *Jencks* v. *United States*, *supra*, 353 U.S. at 667 (emphasis supplied). Since the Jencks Act was designed by Congress to clarify and to avoid expansive readings of the *Jencks* case (*Palermo* v. *United States*, *supra*,

360 U.S. at 350), surely Congress did not intend to require production of a different kind of statement taken at a different time for a wholly different purpose, namely those recorded by prosecutors *after* "time dulls treacherous memory." Such statements (if they can be called that) would be far less valuable for impeaching purposes to test a witness's credibility.

Moreover, to require the production of such material from a lawyer's file, even after trial has begun, may impede thorough pre-trial preparation and "could disrupt the orderly development and presentation of his case." *United States* v. *Nobles, supra,* slip op., p. 13. Knowing that his notes were producible, the lawyer would likely feel obliged either to take full, easily understandable, narrative statements from a witness with whom he talked immediately before trial, or to take no notes at all. While the former would provide a reliable source for impeachment of the witness, they would not serve the lawyer's purpose on the eve of trial: to provide himself with shorthand reminders of areas and events about which he intends to question the witness at trial. Also, the careful preparation of precise notes would be too time-consuming at a time when the lawyer is under great time pressure. Rather than create additional producible material that, because of its length and completeness, is of limited utility to them at trial, many lawyers would choose the alternative of taking no notes at all. This, in turn, could impair the coherence with which cases are presented, to the overall detriment of the judicial system.

2. Production of Attorneys' Notes That Are Not "Statements," Within the Narrow Meaning of that Term, Creates an Undue Risk that Attorneys Will be Required to Testify

The other basic purpose underlying the "work product" doctrine is to prevent the unseemly occurrence of an attorney being forced to become a witness at trial to testify about matters in his file that have been disclosed to his adversary. *Hickman* v. *Taylor, supra,* 329 U.S. at 512–513. The potential for this practice to become prevelant is particularly great in the present context.

Requiring production of an attorney's witness interview notes would create three interrelated problems. In the first place, there would be the necessity for a collateral proceeding to translate or decipher the notes. An investigator's interview report is normally a typed document in narrative form; there can be no question as to what it purports to say. A lawyer's notes, in contrast, are almost always handwritten and, as in this case, quite cryptic. If their production is compelled, the lawyer will be hard put to avoid testifying as to their meaning—if for no other reason than to explain them so they will be intelligible to the jury, or, if his testimony is taken out of the presence of the jury, sufficiently understandable to opposing counsel that they can be used in cross-examining the witness. Second, in contravention of the policies underlying the Jencks Act, such production would permit a witness to be impeached not by his own words but by language used by the attorney, permeated with the attorney's inferences, either in taking the notes in the

first instance or in explaining them to opposing counsel.

Finally, since the attorney's notes will often be in his own cryptic language, there are bound to be verbal inconsistencies between them and the witness's testimony. If the witness denies that the notes correctly reflect what he said in his conferences with the attorney, it will be open to opposing counsel to call the note-taker to the stand to authenticate them and testify to the content of the interview. *United States* v. *Nobles, supra,* concurring op., p. 11, n. 13 (White, J.). Or the attorney himself may feel impelled to take the stand to explain further the meaning of his notes or, in some instances, to contradict his own witness. As Mr. Justice Jackson explained the problem:

> * * * Whenever the testimony of the witness would differ from the "exact" statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility—perhaps against that of his

> chief witness, or possibly even his client. [*Hickman* v. *Taylor, supra,* 329 U.S. at 517 (Jackson, J., concurring)].

The credibility of the lawyer, the circumstances under which the notes were taken, and their decipherment would thus become collateral issues to be resolved by judge or jury at trial, thereby delaying, and possibly subverting, a fair and proper resolution of the primary issue in the case.

It was just this kind of potential problem that led the Court in *Hickman* to distinguish between "statements written by the witness and in the possession of the lawyer, and those statements which were made orally by the witness and written down by the lawyer. Production and use of oral statements written down by the lawyer would create a substantial risk that the lawyer would have to testify." *United States* v. *Nobles, supra,* concurring op., p. 11 (White, J.). A similar risk is created by production and use of notes written by a prosecutor and not signed, initialed, or approved or adopted in some formal way by the witness, as we submit the Jencks Act requires. Requiring production of such notes "forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks." *Hickman* v. *Taylor, supra,* 329 U.S. at 513. As stated by Mr. Justice Jackson, concurring in *Hickman* (*id.* at 517):

> Every lawyer dislikes to take the witness stand and and will do so only for grave reasons. This is partly because it is not his role; he is almost invariably a poor witness. But he steps

> out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force him to be a witness, not as to what he has seen or done but as to other witnesses' stories, and not because he wants to do so but in self-defense.[31]

The question it was unnecessary to reach in *Nobles,* namely, "whether the policies against putting in issue the credibility of the lawyer who will sum up to the jury outweigh the jury's interest in obtaining all relevant information * * *" (concurring op. of White, J., p. 12), may be resolved in the instant context by defining the term "statement" strictly where lawyers' notes are involved, as we suggest Congress intended in the Jencks Act. Production of such statements is unlikely to inhibit the attorney's trial preparation or performance and will also rarely require that the attorney become a witness; thus, it does not seriously implicate the policies underlying the work product doctrine. A broader sweep through the attorney's notes and files, on the other hand, will activate those concerns and should not be permitted.

[31] Invoking ABA Standards for Criminal Justice, *The Defense Function*, § 4.3(d) (Approved Draft 1971), *amici* suggest that the prosecutor can avoid the risk of testifying by interviewing his witnesses in the presence of a third party, and that he should be required to do so since that onus is placed upon defense attorneys (Am. Br. 33–34). *Amici* do not explain, however, how a third party can translate or authenticate notes taken by the prosecutor himself. More importantly, the ABA Standard they cite refers to impeachment by the defense attorney of an *adverse* witness whom he himself interviews. See ABA Standards for Criminal Justice, *The Defense Function*, *supra*, Commentary to § 4.3(d), p. 231. The prosecutor has the same burden in this respect as does the defense; if he wishes to attempt impeachment of a hostile witness whom he personally has interviewed he must either have had a third party present at the interview or undertake to testify himself. It hardly follows from that proposition that an attorney must interview his own witness only with someone else present, in order to facilitate his impeachment by his adversary. Surely *amici*, who speak of reciprocity, do not suggest that defense attorneys should be required to interview *their own* witnesses in the presence of a third party in order to facilitate impeachment by the prosecution.

3. The Legislative History of the Jencks Act Indicates That Congress Intended to Shield Prosecutors' Trial Preparation Notes From Production

There is a clear relationship between the work product principles discussed above and the policies of the Jencks Act. As previously indicated, Congress purposely defined the term "statement" in a quite narrow way and intended that only those materials falling within that limited definition be produced. The primary reason for the adoption of a narrow definition was, as this Court has recognized, that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." *Palermo* v. *United States, supra,* 360 U.S. at 350. A second reason for the narrow definition was the congressional fear that "disclosure of * * * [an] agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest * * *." *Ibid.* See also H.R. Rep. No. 700, *supra,* at 3. Yet a third reason, especially pertinent to this discussion, was the concern that a government trial lawyer's notes made

in preparation for trial not be routinely disclosed to the defense.

It is recognized that the Jencks Act was motivated largely by the fear that this Court's decision in *Jencks* was being given an overly expansive reading by the lower federal courts. See *Palermo* v. *United States, supra,* 360 U.S. at 350. Congress intended by the legislation to correct the "widespread misinterpretations and popular misunderstandings of the opinion in the Jencks case." S. Rep. No. 981, *supra,* at 3. Cited by the Senate Judiciary Committee as among the "unusual demands for production presuming on the authority of Jencks [which] illustrate the boldness of the attempts to enlarge the decision" (*id.* at 9) was "a narcotics case in the [S]outhern [D]istrict of New York, [in which] the defense demanded the notes made by the assistant United States attorney in preparing his case for trial" (*ibid.*). Congressman Keating of New York, a manager of the legislation on behalf of the House of Representatives, also made reference to that case as one of the misapplications of the *Jencks* decision by the lower federal courts, which, he stated, the legislation would rectify. 103 Cong. Rec. 16118 (1957).

Another indication that Congress intended to exclude prosecutor's notes is found in the debate over whether the term "statement" should be defined, *inter alia,* as "any transcriptions or *records* of oral statements made by the witness to an agent of the Government," or "any transcriptions *and recordings*" of such statements. 103 Cong. Rec. 15930 (1957) (emphasis supplied). Senator Hruska supported the use

of the word "recordings" because he feared that the term "records" might be interpreted to require the production of memoranda made by government attorneys of their interviews with witnesses whom they had prepared for trial. As he said (103 Cong. Rec. 15931 (1957)):

> * * * No careful lawyer ever puts a witness on the stand without interrogating the witness as to the ground he can cover legitimately in the testimony in the case at hand. In the process of interviewing the witness, if the lawyers are at all careful and if they follow the pattern which has been followed for many, many years, they will make a memorandum as to what the witness said to them, which is their understanding of what the witness said he would cover in the testimony. It is submitted that the word "records" would extend even to such memorandums, for which the witness is not responsible, since he is not the one who wrote them and he is not the one who set them down on paper. Those memorandums would be available for the purpose of impeaching the witness.
>
> It would seem to me not to be in keeping with the purpose of the proposed legislation to have a witness impeached by material for which he himself was not responsible.

The definition of "statement" ultimately agreed upon in conference—in order to "remove any doubt as to the kinds of statements affected by the bill" (H.R. Conf. Rep. No. 1271, *supra,* at 3)—used the word "recording," as proposed by Senator Hruska. Since a primary reason for using that word was to avoid pro-

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duction for impeachment purposes of the trial lawyer's memorandum of his witness interview, it follows that such memoranda and notes should not be held producible under the Jencks Act.[32]

In sum, as the Second Circuit has recognized, the "legislative history strongly indicates that one evil Congress sought to remedy in passing the Jencks

[32] The Jencks Act can be read to include only statements given to a government investigative or law enforcement agent during an investigation, and not those given to a government trial attorney in preparation for trial. Congress expressly and purposely "limit[ed] the types of statements and reports which come under the provisions of the bill to statements of Government witnesses or prospective witnesses * * * *made to an agent of the Government* * * *." H.R. Conf. Rep. No. 1271, *supra*, at 3 (emphasis in original). The statute itself included this language. Since the Jencks statute was intended to limit, not expand, the scope of the *Jencks* case, which involved statements to F.B.I. agents, Congress' use of the term "agent of the Government" was intended to require production only of statements of witnesses made to investigative agencies, not those given to prosecutors in preparation for trial. See H.R. Rep. No. 700, *supra*, at 3. Indeed, Senator Javits, in proposing the addition of the words "to an agent of the Government," stated that "this bill is intended to relate only to statements or reports of Government agents, and *we understand those to mean enforcement officials.*" 103 Cong. Rec. 15927 (1957) (remarks of Senator Javits) (emphasis supplied). See also *id.* at 16115 (remarks of Representative Willis); *id.* at 15916 (remarks of Senator O'Mahoney). In common parlance, a government trial attorney is not considered an "enforcement official."

While the language "to an agent of the Government" was deleted in 1970 when the Jencks Act was amended to add grand jury statements to the statutory definition of statement (Pub. L. 91–452, Title I, Section 102, 84 Stat. 926), petitioner himself correctly recognizes (Br. 35) that this amendment was made only to expand the production requirements to include grand jury statements and was not intended "to otherwise limit" the "disclosure requirement of the statute."

Act was the possible production of notes made by government attorneys in preparing their case." *United States* v. *Crosby*, 294 F.2d 928, 951 (C.A. 2).[33] Moreover, even those members of Congress who urged a broader standard of producibility than that finally enacted did not express the view that government trial attorneys' notes need be produced under the Act, nor did they disagree with the concerns expressed by Senator Hruska, Congressman Keating, and others that it would be unfair and an expansive reading of the *Jencks* case to require production of trial preparation notes for use in impeaching government witnesses. Nor is there any indication that this Court in *Jencks* intended to abandon the concerns it earlier had expressed in *Hickman* v. *Taylor*.[34]

D. THIS COURT SHOULD REJECT PETITIONER'S SWEEPING NOTIONS OF WHAT CONSTITUTES A PRODUCIBLE STATEMENT

The record in this case, as it now stands, establishes certain basic facts about the prosecutors' notes created during the course of their extended interviews of

[33] See also this Court's comment in *Palermo* v. *United States*, *supra*, 360 U.S. at 359–360, where it pointed out that the House Report (H.R. Conf. Rep. No. 1271, *supra*) indicated that "a very restrictive standard is to be applied" in determining whether notes of what a witness said are to be produced when those notes are not verbatim recordings, or nearly so.

[34] The cases that have rejected the notion that there is a work product exception to the Jencks Act for the prosecutor's trial preparation notes have not considered the legislative history, as we have here, or analyzed the relationship between *Hickman* and *Jencks*. See, *e.g.*, *Saunders* v. *United States*, 316 F.2d 346, 349–350 (C.A.D.C.), certiorari denied, 377 U.S. 935; *United States* v. *Hilbrich*, 341 F.2d 555, 557 (C.A. 7).

Newman immediately prior to and during the trial: the notes are not a substantially verbatim record of Newman's own words; they are not a coherent, organized account in narrative form of what Newman saw, heard, or did; they were not read over by Newman and signed by him or formally adopted as his statement; they were not made for the purpose of recording precisely Newman's account of events so that he and others might in the future be able to refer to them in reconstructing those events (*i.e.*, for the purpose of recording and preserving as accurately as possible his past recollection), but were instead taken to aid the prosecutors in their preparation for and conduct of the trial. Under the arguments we have adduced above, these facts require the conclusion that the notes were not producible under the Jencks Act.

Petitioner, relying principally on *Campbell* v. *United States*, 373 U.S. 487 (*"Campbell II"*), urges a far broader definition of producible statements under the Jencks Act, under which virtually any writing whose contents have been disclosed to the witness and the general correctness of which the witness has verified would be deemed a prior written statement of the witness producible under Section 3500(e)(1) as "otherwise adopted or approved."[35] Even if it is disposed to consider doing so, the record in this case is presently too sparse to permit the Court now to set forth upon the path petitioner invites it to travel. There are, moreover, compelling reasons for declining

[35] In addition to relying on *Campbell II*, *amici* also cite *Clancy* v. *United States*, 365 U.S. 312, 315–316, for the proposition that, since the notes were assertedly adopted by Newman, they did not have to be a verbatim recital of his oral statements (Am. Br. 11). But in *Clancy* the investigating agents themselves testified concerning conversations which they had had with certain defendants; the statement at issue was a memorandum which they had prepared reflecting those conversations. The situation was thus parallel to that in *Nobles*. The memorandum was producible for impeachment *of the agents* because it constituted their direct prior statement about the conversations; it did not have to contain a verbatim recital of what the defendants had said, because it was not produced to impeach the defendants. The "adoption" in the case occurred because the memorandum was written by one agent (upon the basis of notes prepared by the second) and was merely signed by the second. For *Clancy* to be applicable to this case, Newman would have had to have been a defendant, the prosecutors would have had to testify against him concerning admissions he made to them, and one of the prosecutors would have had to have written a memorandum based on the notes, which the other prosecutor merely signed.

to travel this route and refusing to extend *Campbell II* to prosecutors' interview notes.

1. Unless this Court is prepared to order virtually *carte blanche* access to an attorney's witness interview notes, it can render no decision in favor of petitioner on this record. Any attempt to articulate standards for determining the producibility of non-verbatim interview notes and to define what actions constitute "adoption" or "approval" on this record would necessarily entail abstract and hypothetical rule-making; for we do not presently know what statements we are talking about or how such statements may be said to have been "adopted or approved" by this witness. Virtually all that is now known is contained in the following brief exchanges:

> Q. So you met with the Government representatives on May 12, is that right?
>
> * * * * *

A. Yes, I met with the Government on May 12th.[36]

Q. And did you discuss what your testimony would be here?

A. Yes.

Q. Who did you discuss it with?

A. Mr. Lebowitz, Mr. Keilp.

Q. And did they take notes or jot down anything at all of what you were saying?

A. Yes.

Q. There wasn't a reporter present?

A. No.

Q. And as they took notes, did they sometimes question you about what you had just said to make sure that they got it down correctly?

A. They may have. I don't really remember that that was part of the pattern.

Q. All right. * * * [App. 90–91].

* * * * *

Q. When was the next time you met with them?* * *

A. * * * I believe the weekend of June 9th and 10th I was also here at Phoenix. * * *

Q. Who did you meet with in the Government's office?

A. Mr. Lebowitz and Mr. Keilp.

Q. Did you discuss your testimony?

A. With Mr. Lebowitz and Mr. Keilp?

Q. Yes.

A. Yes.

Q. Was a reporter there?

A. No.

[36] The actual date was May 13, 1973. See App. 91.

Q. As you were explaining—or discussing your testimony, did anyone take notes?

A. The two gentlemen took notes.

Q. Were they occasionally read back to you to see whether or not they correctly understood what you were saying?

A. Probably from time to time.

Q. All right, sir. Did you either correct them or say, "Yes, that's right," or "No, that's not right because it went this way, I believe," words to that effect?

A. Yes, that would happen. [App. 91–92.]

It can hardly be said that this establishes any kind of adoption by the witness of the words written by the prosecutors, let alone a sufficient adoption to transmute their words into a statement of Newman's. Unanswered questions abound. Were notes read back to Newman every time he met with the prosecutors, or only on June 9 and 10?[37] Were all of the notes actually read back verbatim to Newman? Were any of them? If some, which ones? Were Newman's comments regarding the prosecutors' notes ever addressed to the precise language used rather than to the general factual accuracy of their content? To the extent Newman did suggest corrections, were they then in fact incorporated in the notes by the prosecutors? If they were, were the notes as corrected reread to the witness? Indeed, which of the notes were even in exist-

[37] Newman met with the prosecutors on May 13, 1973, June 9, 10, 16 and 17, and "portions of each day since" through June 26 (App. 93). He also spent an additional five or six hours a day in the prosecutors' office between the completion of his testimony during the government's case-in-chief and the beginning of his rebuttal testimony (App. 110).

ence at the time of Newman's direct testimony and the defense production request?

It would be most unwise, we believe, for this Court to attempt to establish standards for defining "adoption or approval" without knowing the answers to questions such as these. Moreover, when answers are available for this case, this witness, and these notes, we suspect they will show that the holding of the court of appeals was correct under virtually any standards this Court might be likely to adopt. Accordingly, if the Court finds any merit in the contention that attorney interview notes that are not verbatim renditions of the witness's statements and that have not been read and signed by the witness for the purpose of adoption may nevertheless be held producible, sound decision-making requires that it follow the course adopted in *Campbell* and remand for a hearing before the district court at which answers to the questions set forth above can be obtained. See *Campbell* v. *United States,* 365 U.S. 85 (*"Campbell I"*). (If the Court adopts our views as set forth earlier in this brief, no such remand would be required, since it is already clear from the record that the notes do not constitute producible statements under the standards we propose.)

2. The foregoing discussion of the possible need for a remand in this case is not, of course, intended to suggest that this kind of hearing needs to be or should be held in every case in which an attorney has interviewed one or more of his witnesses in preparing for trial and has taken notes of what the witness has told

him. Indeed, one of the major drawbacks to acceptance of the broad definition of "statement" that petitioner urges is that it would lead to a collateral inquiry in virtually every case in which an attorney has interviewed his witnesses before trial and taken notes of the interviews. Because of the purpose for which such notes are taken and their generally cryptic nature, they would not be routinely produced even under the broadest definition of "statement" reasonably foreseeable. Rather, there would always be questions about how complete the notes were, whether and how the notes were read back to the witness, precisely how they were adopted or approved by him, and, if isolated fragments of the notes can constitute "statements," what portions of the notes were so approved.

Moreover, if isolated fragments of notes can constitute adopted or approved statements within the meaning of the Jencks Act, as petitioner suggests, it will almost always be necessary for the government trial attorney to testify about what occurred at the witness conference, what portions of the notes were read back to the witness, how the witness responded, and what the isolated fragment means in the context in which it was written by the lawyer. Finally, even if an isolated fragment was "adopted or approved," there will be a separate question in each case as to whether it is fair to use such a "statement," out of context, for impeachment purposes, or whether the surrounding material must also be produced—even though it contains the attorney's words, not the witness's—in order to give the fragment some meaning.

We suggest that this kind of collateral inquiry can be avoided by defining the term "statement" in the strict fashion that Congress intended, thereby also giving effect to the attorney work product policies underlying the Jencks Act. Since this narrow definition of "statement" requires production of only a relatively clearly defined category of materials, all that should be necessary when attorney's notes are at issue is a representation from the attorney as to whether his notes contain any continuous, narrative, substantially verbatim statements of the witness, any statements actually written by the witness, or any statements virtually dictated by the witness word-for-word and then read by or to the witness and signed, initialed or formerly approved by him. If, as in this case (App. 98), the attorney represents that there is no such material in his file, the inquiry would be at an end; if, on the other hand, he does have material of this nature, he would produce it.

In those few cases where there is some question in the attorney's mind as to whether material in his file is a "statement," he would submit the questionable portion to the court for an *in camera* inspection. But if the strict definition of "statement" that we urge for attorneys' interview notes is accepted, such borderline cases will arise infrequently, and, when they do, a brief *in camera* inspection or inquiry will nearly always be sufficient to resolve the matter. There will rarely be need to take extrinsic evidence from the prosecutor and the witness, because the nature of the inquiry will be so limited that the

material on its face usually will fall within or without the definition of "statement." Moreover, if the guidelines are as clear as those we propose, a prosecutor's representations as to whether there are Jencks Act "statements" in his file will suffice in lieu of testimony because the prosecutor—"who is an officer of the court as well as of the United States"—can be expected to conduct the government's case responsibly and "in a manner consistent with basic legal ethics and professional care." *Campbell I, supra,* 365 U.S. at 103 (opinion of Frankfurter, J.).

Thus, in this case, the prosecutor represented to the district judge (App. 98) that his notes reflected only "substances of conversations * * *. They were not taken down verbatim. They were not shown to [Newman] * * *. Nobody was asked to sign them in the form of a signed statement * * *." This representation by the prosecutor was sufficient to demonstrate that the notes were not a written statement made by Newman and were not adopted or approved by him, within the meaning of 18 U.S.C. 3500(e)(1). They were therefore not producible under the Jencks Act.

3. Finally, there are significant distinctions between this case and *Campbell II,* upon which petitioner relies as authority for his sweeping notion of what constitutes a producible statement.

While the agent in *Campbell* did not write down a substantially verbatim account of everything the witness told him, the notes were "complete * * * with respect to the pertinent information" (373 U.S. at 489). Here, as we have demonstrated, there was no

attempt to make notes that could in any sense be considered "complete," because the attorneys' purpose in taking the notes, unlike the investigator's, was to provide shorthand aids for his own use at trial. Moreover, in *Campbell*, the agent read back to the witness not merely the substance of the notes but "the precise words" contained therein, "and to achieve this correspondence [the agent] looked down at the jottings each time before he uttered a sentence;" the witness then said that what the agent had read was correct. *United States* v. *Campbell*, 199 F. Supp. 905, 906 (D. Mass.). Here, the prosecutors did not read back the "precise words" of their notes or look down at them each time before communicating with Newman, because their purpose, unlike the investigator's in *Campbell*, was not accurately to capture Newman's factual account of events in Newman's own words so that he and others might later be able to refer to them in order to reconstruct those events.

At most, the record shows that Newman occasionally verified or corrected the prosecutors' understanding of the *facts* (see App. 90–92); there is no indication that he verified, authenticated, corrected or made changes in the actual *language* used by the prosecutors to enter their understanding of the facts into their notes, so that the statement properly could be considered Newman's own. An effort by the prosecutors to get Newman's version of the facts clear in their minds before they made entries in their notes does not indicate that the witness approved or was even aware of the language or phraseology used in

taking the notes, as was the case in *Campbell*. *Campbell* did not hold, as petitioner and *amici* suggest (Br. 42; Am. Br. 11), that a totally nonverbatim recital of a witness's oral statement becomes the witness's written statement if it is "adopted" by him, by having portions of the facts contained therein occasionally read back to, or checked with, the witness. For a partial reading back and verification is insufficient to transform another's notes into a written statement "adopted or approved" by the witness. See *United States* v. *Smaldone*, 484 F. 2d 311, 317–318 (C. A. 10); *United States* v. *Scaglione*, 446 F. 2d 182, 184 (C.A. 5), certiorari denied, 404 U.S. 941.[38]

[38] The facts in *Smaldone* are strikingly similar to those in this case. As here, every "investigative statement" given by the witness had been turned over to the defense, but the notes "made by the Assistant U.S. Attorney on a yellow pad" during a conference a few days before the witness testified were not produced (484 F. 2d at 316). When asked whether the Assistant United States Attorney "would read them [the notes] back to him on occasion to make sure that they were accurate," the witness responded: "Sometimes" (*ibid.*). The district judge declined defense counsel's request for production of the yellow pad.

The court of appeals affirmed. It held that the notes were not a "statement" within the Jencks Act because it was not established whether the answers read back to the witness by the prosecutor "were verbatim or substantially so * * *. We are not disposed to react on any ritualistic basis merely because there was some reading back" (484 F. 2d at 317). "The fact that there is a partial reading back and verification does not necessarily render the material a statement" (*id.* at 318).

In *Scaglione*, the court acknowledged "the possibility that the witness may adopt or ratify an interview report in a piecemeal manner by response to a number of inquiries as effectually as by a single generalized response" (446 F. 2d at 184). Relying on *Palermo*, the court said that the important question "is whether

Thus, it is apparent that petitioner seeks to have this Court not merely apply *Campbell* to a factual situation that is not on all fours, but significantly to extend it to require production, as a witness's own written statement under 18 U.S.C. 3500(e)(1), of the language of another never seen, authenticated or verified by the witness himself. Whatever the merit of the *Campbell* decision on the facts then before the Court, any such extension would be a sharp departure from the congressional intention, previously discussed, strictly to limit the kind of material that would be producible under the Jencks Act to assure that a witness cannot be impeached by a summary of an oral statement which is neither a substantially verbatim recital of what he has said or a writing which he has seen and formally accepted as correct. Moreover, there is serious question whether *Campbell* ought ever to be applied to attorney's notes, as opposed to an agent's report, because, as we have demonstrated, an attorney interviewing a witness in preparation for trial has no reason either to record and preserve the precise language of the witness as accurately as possible or to verify that language with the witness.

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the witness has made as his own 'the product of the investigator's selections, interpretations and interpolations,' *Palermo* v. *United States* [*supra*, 360 U.S. at 350], so that the defense should be permitted to use it to impeach him. If the witness has not done so it is grossly unfair to use the language, interpretations and interpolations of someone else to impeach him" (446 F. 2d at 184). The court concluded that the district judge's finding, that the witness did not adopt the interview reports, was not clearly erroneous.

Finally, we cannot help but question the continuing vitality of the *Campbell* approach in this post-*Brady* era. In *Campbell,* there appeared to be a significant contradiction of material fact between the witness's trial testimony and what he was reported by the agent to have said when interviewed. While the Court reiterated its view that no showing of inconsistency is a prerequisite to the production of documents under the Jencks Act (373 U.S. at 497, n. 13), its decision, we suspect, was based in part on its concern that it would be unfair to deny production of the statement there in issue. It may be that, were the situation presented by *Campbell* considered today, the Court would not strain the definition of "statement" contained in 18 U.S.C. 3500(e)(1), but would inquire instead whether portions of the report were producible under *Brady* v. *Maryland, supra,* and *Moore* v. *Illinois,* 408 U.S. 786.[39]

II. THE NOTES WRITTEN BY NEWMAN HIMSELF WERE NOT PRODUCIBLE UNDER THE JENCKS ACT

The petition for a writ of certiorari in this case was granted to consider whether the Jencks Act contains an "attorney's work product exception" that makes non-producible an attorney's notes of conversations with a witness. However, included among the notes in the prosecutors' files in this case, which were reviewed by the court of appeals, are 40 pages of material written by witness Newman himself. It appears

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[39] The *Brady* doctrine was only two weeks old at the time *Campbell II* was decided.

that the question of the producibility of those notes is beyond the scope of the grant and turns upon different considerations. There is no reason to believe that the law regarding producibility of a witness's own writings in the possession of the government is in serious doubt or that such an issue is recurring or important. Accordingly, it seems unnecessary for this Court to consider the relatively unimportant question whether the particular notes written by the witness Newman in this case, or any part of them, are in fact producible statements.

We recognize that petitioner, not having seen the packet of notes at the time he filed his petition, had no way of knowing that any of them were written by Newman himself. Had he been aware of this fact, he may have presented a broader or additional issue for the Court's consideration (although we question whether the Court would have granted certiorari on that aspect of the case). Indeed, we first became aware that some of the notes were written by Newman himself during the preparation of the brief in this Court. As we discuss below, it seems clear from simple inspection of the notes and review of the course of events at trial that there is little in them that was even arguably producible. In order to permit petitioner to make relevant arguments as to the producibility of the Newman notes, the Court may wish to remand to the district court for further consideration of this issue. For reasons we now discuss, however, we think such a remand unnecessary.

A. Included among the Newman notes is a seven-page narrative (pages 232–238) relating to the activ-

ities of Paradine and his contacts with both Newman and petitioner. This appears to be a "statement" within the meaning of the Jencks Act. However, petitioner made his demand for production only once—at the conclusion of Newman's direct testimony during the government's case-in-chief. Thus, the statement was not producible unless it existed at that time—a doubtful proposition, since the statement was prepared for use in cross-examining Paradine when he testified for the defense. Even if the statement did exist, however, it would not have been producible after Newman's direct testimony in the government's case-in-chief, because, as is evident from examination of the trial transcript, none of Newman's testimony to that point pertained to Paradine. See 18 U.S.C. 3500(b), (c). It was not until Newman testified on rebuttal that the statement became germane and hence subject to production. At that point, however, petitioner made no demand for Jencks Act statements. See App. 110; Tr. N–419—N–424. Under subsection (b), a witness's prior statement is producible only "on motion of the defendant." It follows that production of the statement was waived. Cf. *United States* v. *Wisener,* 494 F.2d 516, 517 (C.A. 5).

In any event, the seven-page narrative statement related solely to the activities of Paradine. But before Newman really got into that part of his rebuttal testimony, which was directed toward refuting Paradine's testimony for the defense, petitioner objected that Paradine had never testified concerning the matters that Newman was purportedly rebutting. The court cut the line of testimony short until the govern-

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ment could show from the transcript that it comprised proper rebuttal testimony (see App. 108–110). The prosecutors never returned Newman to the subject. As a result, only seven pages of Newman's 132-page rebuttal testimony pertained to Paradine (App. 101–107; Tr. N–337—N–469), and inspection of the seven-page narrative statement written by Newman shows that only one and a half pages relate to that testimony.

As this Court has said: "[T]here can be no complaint by a criminal defendant that he has been denied the opportunity to examine statements by government witnesses which do not relate to the subject matter of their testimony * * *." *Scales* v. *United States,* 367 U.S. 203, 258. Moreover, the small segment that is related is totally consistent with Newman's rebuttal testimony. Accordingly, considering the length of the trial and the lack of any inconsistency, the failure to produce a one-and-one-half page statement that related only to an aborted line of rebuttal testimony was, if error at all, harmless error.

B. An examination by this Court of the remainder of the notes handwritten by Newman—a total of 33 pages—will demonstrate that few, if any, are in fact "statements" within the meaning of the Jencks Act.

Twenty pages of the notes (pages 126–129, 131–146) appear on their face to be questions prepared by Newman for the prosecutors to use in cross-examining petitioner; one page (page 147) is a chronology of events in outline form, some entries being no more than a word or two or an abbreviation;

four pages (pages 224–227) contain Newman's analysis, with page references, of an official report prepared by Paradine, who appeared as a defense witness; and three pages (pages 18–19, 208) contain outlines suggesting how the prosecutors should present their case to the jury. These 28 pages of the Newman notes are not "statements" but, rather, are proposed questions and analyses of information for use by the prosecutors in cross-examining petitioner and Paradine. They do not state what Newman asserted the facts to be; they simply contain specific questions and other suggestions of means by which the prosecutors could test the factual assertions made in court by petitioner and Paradine. Two additional pages (pages 228 and 231) each contain a few words that convey no coherent meaning.

Thus, none of these 30 pages of notes constitute material that could properly be set against Newman's trial testimony to develop inconsistencies between them and the factual assertions he made from the witness stand, and it is therefore readily apparent that they are not "statements" within the meaning of the Jencks Act.[40] Accordingly, the conclusion of the

[40] A related "work product" consideration militating against production of such material is that the inevitable result of production at the time of Newman's direct testimony would have been to advise petitioner and his witness of precisely what they could expect on cross-examination, thereby enabling them to tailor their testimony accordingly. Moreover, while Newman was the last government witness in this case, a witness like Newman who has aided the prosecution in its preparation may well be one of the first witnesses in another case. Disclosure, when such a witness completes his testimony, of proposed orders of proof, questions for other pros-

court of appeals (App. 120), that none of the notes that it examined were statements under 18 U.S.C. 3500(e), should be affirmed.[41]

C. Should this Court conclude that an inspection of the notes handwritten by Newman does not provide convincing evidence that they are not statements within the meaning of the Jencks Act, or should the Court be unwilling to conclude on the present record that the failure to produce the notes, if error, was harmless, it will be necessary to remand the case to the district court to consider the Newman notes.

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ecution or defense witnesses, or analyses of forthcoming exhibits which the witness has prepared would provide the defense with premature insights into the prosecution's case that could only be disruptive to its orderly development and presentation.

[41] The remaining three pages of the Newman notes (pages 130, 229–230) are accounting analyses. We concede that such analyses may in some circumstances be "written statements" of a witness within the meaning of 18 U.S.C. 3500(e)(1), and would be producible at trial after the witness has testified on direct examination, if the accounting analyses "relat[e] to the subject matter as to which the witness has testified" (18 U.S.C. 3500(b)). See also *United States* v. *Nobles*, *supra*, slip op., p. 14; cf. *Clancy* v. *United States*, *supra*. But here, an examination of the trial transcript shows that Newman did not testify about the facts contained in the accounting analyses except in a most general way. Moreover, judging from the fact that page 130 immediately precedes 16 pages of proposed questions for cross-examination of petitioner, and pages 229–230 are in the midst of pages relating to the witness Paradine, it is not even clear that these analyses were in existence at the time of Newman's testimony in the government's case-in-chief. Finally, despite the fact that petitioner was given a copy of the Newman notes to inspect in conjunction with the preparation of his brief in this Court (see p. 14, n. 9, *supra*), he has failed to suggest any inconsistencies between the accounting analyses and Newman's trial testimony. In these circumstances and in the context of a seven-week trial, the error, if any, in failing to produce them is harmless.

The first question to be resolved by the district court if there is to be a remand hearing is which, if any, of the notes handwritten by Newman were even in existence at the time petitioner made his Jencks Act request during cross-examination of Newman when he appeared in the government's case-in-chief (App. 93–94). For if the Newman notes were not in existence until after Newman's testimony, there could be no violation of the Jencks Act by not producing the notes for use by petitioner in cross-examining Newman.

The next question for resolution at the remand hearing is which of the notes—if any were in existence at the time of the demand—are "statements" within the meaning of the Jencks Act. As we have indicated, our own examination of the notes persuades us that very few of them, if any, are in fact "statements." However, if, contrary to our analysis, the district court should conclude on a remand that some of the Newman notes constituted "written statements" within 18 U.S.C. 3500(e)(1), it would next have to compare the notes with Newman's direct testimony at trial to determine whether any portion of the notes "relates to the subject matter as to which [Newman] has testified" (18 U.S.C. 3500(b)). Because the notes were intended largely to aid the prosecutors in their cross-examination of petitioner and Paradine, it is likely that such a comparison would show that few, if any, of the Newman notes related to Newman's direct testimony during the government's case-in-chief. If only a small portion would have been pro-

ducible for petitioner's use on cross-examination, the district judge may well conclude that, in the context of a seven-week trial, failure to produce the notes was harmless error.

III. THE NOTES OF THE GOVERNMENT TRIAL ATTORNEYS AND OF THE GOVERNMENT WITNESS WERE NOT PRODUCIBLE UNDER EITHER THE FIFTH OR SIXTH AMENDMENT TO THE CONSTITUTION

A. THE PROSECUTOR'S NON-PRODUCTION OF THE NOTES WAS NOT A *BRADY* VIOLATION

This Court's decision in *Brady* v. *Maryland*, 373 U.S. 83, recognized that it is a violation of due process for the prosecution, in the face of a defense request, to suppress evidence that is "favorable to the accused and is material either to guilt or to punishment." *Moore* v. *Illinois*, 408 U.S. 786, 794. While the terms "favorable" and "material" have not been defined by the Court, we think it plain that the basic import of *Brady* is not that there is some abstract right on the part of a defendant to obtain all evidence possibly helpful to his case even in the most tangential way, but only that he is entitled to evidence of central importance that is likely to affect the outcome of the case. Thus, *Brady* does not require, as petitioner argues (Br. 61, 64), the production of any materials "which are not technically statements within the meaning of 18 U.S.C. 3500(e)" but are nevertheless "favorable" in that they would be helpful in testing "credibility." Were *Brady* so read, there would be nothing left of the carefully constructed Jencks Act,

with its limited definition of "statement." For all "materials," whether or not statements under Section 3500, would thereby become producible under *Brady* because possibly helpful in attacking a witness's credibility.[42]

The Jencks Act affords the defendant the opportunity to confront a government witness with discrepancies in language between his prior statements and trial testimony, to point up even minor differences in emphasis and the like.[43] As McCormick has pointed out:

> The theory of attack by prior inconsistent statements is not based on the assumption that

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[42] The cases upon which petitioner relies (Br. 59–62) are inapposite. *United States* v. *Wilkins*, 326 F.2d 135 (C.A. 2), held that it was a violation of due process for the prosecution to fail to disclose the existence of witnesses who would have testified that the defendant was not the person involved in the robbery. Clearly, such evidence is highly favorable to the accused and material to the issue of guilt. No such evidence is involved here.

United States v. *Bryant*, 439 F.2d 642 (C.A.D.C.), involved a tape recording of the offense itself (a narcotics transaction). The recording was thus direct physical evidence of the commission of the offense, which the court of appeals held was discoverable under Rule 16(b), Fed. R. Crim. P. See 439 F.2d at 649. Notes that reflect a witness's prior utterances, on the other hand, are not producible if they do not constitute Jencks statements and are certainly not direct evidence of the commission of the offense.

Finally, petitioner's reliance on *United States* v. *Wright*, 489 F.2d 1181 (C.A.D.C.) is particularly curious, since that case was effectively overruled by this Court in *Nobles*.

[43] The *Jencks* decision was "not required by the Constitution" (*Scales* v. *United States*, *supra*, 367 U.S. at 258), and it was not cast in constitutional terms. *Palermo* v. *United States*, *supra*, 360 U.S. at 345. Neither the decision nor the statute set forth constitutional requirements. *United States* v. *Augenblick*, 393 U.S. 348, 356.

> the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements. [McCormick, *Evidence,* § 34, p. 68 (2d ed. 1972).]

The purpose of *Brady* is significantly different. The concern in that case was with practices rightly deemed so fundamentally unfair as to deprive a criminal defendant of due process of law. Under *Brady,* the question is whether there are specific *facts* in the prosecutor's file that are material to the issue of guilt and favorable to the defendant, in that they are actually exculpatory.

The difference in purpose between the Jencks Act and the *Brady* decision is relevant to the procedure to be followed in each case. Since under the former, a defendant is entitled to attempt the potentially helpful process of impeaching credibility by showing inconsistencies in language, he is entitled to inspect any prior statement reflecting the witness's actual words in order to undertake that process. But because *Brady,* based as it is upon due process concepts, requires only disclosure of actually exculpatory *facts,* the defendant has no right under *Brady* to production of material that does not contain such facts.

Certainly the defense is not entitled to decide for itself, by inspecting the prosecutor's file, whether matter contained therein is favorable and material and therefore should be produced. While this Court's opinion in *Brady* did not specify whether the prosecutor, the defense or the trial judge is to determine what information in the prosecutor's file is "exculpatory" and therefore producible, no court has held that it is a defense determination. Otherwise, as *amici* candidly suggest (Am. Br. 38, n. 5), *Brady* would require an "open file policy"—one of the very evils that Congress sought to counter by enacting the Jencks Act. No court has suggested that the rule of *Brady* requires the prosecution to open its files to the defense to search for all information that is possibly helpful. Cf. *Moore* v. *Illinois, supra,* 408 U.S. at 795; *United States* v. *Fioravanti,* 412 F. 2d 407, 410–412 (C.A. 3).

Nor have any courts adopted *amici's* suggestion (Am. Br. 39) that the trial judge should inspect the prosecutor's file *in camera* to determine whether material therein is producible under *Brady*; those that have considered it have held to the contrary. See *United States* v. *Harris,* 409 F. 2d 77, 80–81 (C.A. 4); *United States* v. *Frazier,* 394 F. 2d 258, 262 (C.A. 4), certiorari denied, 393 U.S. 984; *Archer* v. *United States,* 393 F. 2d 124, 126 (C.A. 5). *Amici* have offered no authority for the proposition that this is properly a determination for the trial judge.[44] We

[44] The cases cited by *amici* (Am. Br. 39) merely note that inspection of specific items was undertaken by the trial courts; they do not hold that such inspection was required. Indeed, *United States* v. *Davis,* 487 F. 2d 112, 122 (C.A. 5), certiorari denied, 415 U.S. 981, while noting that one item was inspected (and eventually produced as a *Jencks* statement rather than as *Brady* material), held that other items—which apparently were not inspected—were not compellable under *Brady.*

submit that after a meaningful defense request for *Brady* material, the representation of the prosecutor that there is no such material in his file is to be accepted by the Court (*Archer* v. *United States, supra,* 393 F. 2d at 126). There is no more reason to require a trial court to look behind a prosecutor's representation that there is no undisclosed *Brady* material in his file than there is to look behind the prosecutor's representation that he has produced all of the prior statements of witnesses in the government's possession."[45]

Finally, it is significant that petitioner's counsel was provided with a copy of the notes prepared by the prosecutors and by Newman during the course of the preparation of his brief in this Court, yet he has failed to point to any contradiction between what is recorded therein and the government's evidence at trial.[46] In any event, he now has the notes; if there is any evidence favorable to petitioner and material to

[45] *Amici* misstate the record when they assert that "the prosecutor never represented to the trial court that the subject notes contained no *Brady* material" (Am. Br. 39), as does petitioner when he claims that the prosecutor did not respond to his request for a disclosure of whether there were any conversations or side agreements with Newman concerning how the latter could plead (Br. 55, n. 27). The record shows that the prosecutor—in response to petitioner's oral motion under *Brady*, *Giglio* v. *United States*, 405 U.S. 150, and *Giles* v. *Maryland*, 386 U.S. 66, for the production of any exculpatory or favorable evidence in the government's possession—represented that "we have produced everything that we are aware of" (App. 99–100). This was clearly a representation that there was no *Brady* material in the notes or any place else and that there were no undisclosed agreements concerning Newman's plea.

[46] Since an examination of the notes shows that there is no contradiction between Newman's testimony and what he said to the prosecutors, it is not necessary in this case to decide if such a contradiction would be *per se* "exculpatory" in the *Brady* sense. We point out that there was more than a mere "contradiction" in both *Giglio* v. *United States*, *supra*, and *Napue* v. *Illinois*, 360 U.S. 264. The due process violation in both cases was that the prosecutor, in one instance negligently and in the other knowingly, allowed perjurious testimony by a prosecution witness to stand uncorrected. See 405 U.S. at 153–154; 360 U.S. at 269.

the issue of guilt, he is free to bring it to the attention of the district court in a motion for new trial based upon newly discovered evidence."[47]

B. THERE WAS NO SIXTH AMENDMENT VIOLATION

The arguments based upon the Confrontation and Compulsory Process Clauses of the Sixth Amendment, raised for the first time in this Court, afford no more assistance to petitioner's and *amici's* position than do their Fifth Amendment contentions.

1. Petitioners' argument based upon the Confrontation Clause (Br. 69–73) appears to be that "a failure to provide material to which a defendant is en-

[47] Petitioner also suggests that the plea bargain between Newman and the prosecutors was other than that represented by Newman in his trial testimony. We reiterate (see p. 8, n. 3, *supra*) that since this Court did not grant certiorari on the question raised in the petition concerning the plea bargain, it is not open to petitioner to raise the question here. In any event, the fact that Newman was placed on probation after being permitted to plead guilty to two misdemeanors presents no conflict with Newman's testimony or with the prosecutor's jury argument that no agreement for a misdemeanor plea was reached (see Pet. Br. 55, n. 27). The prosecutors were not precluded from deciding, after trial, that Newman's cooperation warranted extending greater lenity to him than they had contracted to do; this belated decision, as the court of appeals held (see App. 123) did not retroactively falsify Newman's testimony or the prosecutor's argument concerning the terms of their agreement, as it stood at the time.

titled under the Jencks Act" impermissibly curtails his ability effectively to cross-examine government witnesses and thereby offends the Sixth Amendment right of confrontation (Br. 70). On its face, this argument appears to do little to further the inquiry whether the prosecutors' notes were producible.

Moreover, the cases relied upon by petitioner and *amici* hold only that, consonant with the Confrontation Clause, a defendant cannot be forbidden to undertake any relevant line of cross-examination. See *Alford* v. *United States*, 282 U.S. 687; *Smith* v. *Illinois*, 390 U.S. 129; *Davis* v. *Alaska*, 415 U.S. 308. But the right to unrestricted cross-examination does not carry with it a concurrent right to obtain material from government files not producible either under the Jencks Act or by virtue of the due process consideration recognized in *Brady*. There is no suggestion in the Confrontation Clause or cases interpreting it that a defendant may rummage in the government files or the prosecutor's notes in search of information that might have some utility on cross-examination.

The extent of Newman's cooperation with the prosecutors is in no way comparable to the juvenile probationer status of the witness in the *Davis* case, upon which petitioner primarily relies. The prosecutors' notes cannot fairly be characterized as evidence critical to establishing petitioner's contention that "the Government had its key witness in a truss" (Br. 57), and there is no foundation for *amici's* assertion (Am. Br. 23) that lack of access to the prosecutors' notes precluded petitioner from pursuing the extent of that

cooperation. Petitioner was not forbidden, as was the defendant in *Davis*, from asking questions on the subject. When Newman acknowledged on cross-examination that he had spent an average of five hours a day in the prosecutors' office since his initial appearance as a witness, it was open to petitioner to ask what Newman did during each of those five hour periods and to ask the jury to draw inferences from those meetings about Newman's cooperation with the government. Non-production of the prosecutors' notes was thus irrelevant to petitioner's ability effectively to utilize his right of cross-examination under the Confrontation Clause.

2. Petitioner's argument based upon the Compulsory Process Clause (Br. 66–68) is more elusive. If it is (see Br. 66–67) that a "denial of production of a Jencks Act type of a statement might be a denial of a Sixth Amendment right" (*United States* v. *Augenblick, supra,* 393 U.S. at 356), our answer is, as we have demonstrated, that the material involved in this case is not "a Jencks Act type of a statement."[48] If the argument is (Br. 67) that the failure of the prosecutor to disclose "exculpatory material statements of witnesses on the defendant's request" implicates "the Sixth Amendment's compulsory process guarantee" (citing *Johnson* v. *Johnson,* 375 F. Supp. 872, 875 (W.D. Mich.)), our answer is (see pp. 71–76, *supra*) that the material involved in this case does not

[48] *Augenblick* said merely that in some case (but not the case then before the Court) denial of production of a Jencks statement might constitute a violation of the Compulsory Process Clause.

consist of "exculpatory material statements" in the *Brady* sense.

Finally, Mr. Justice Brennan's concurring opinion in *Palermo,* upon which *amici* rely (Am. Br. 19), suggests no more than that the Compulsory Process Clause may be implicated when a statement not producible under the terms of the Jencks Act contains a direct conflict of fact with the witness's trial testimony. See 360 U.S. at 361–363. We believe it does not further the inquiry in such a situation to cast it in terms of the Jencks Act or the Compulsory Process Clause rather than to utilize the due process analysis of *Brady,* a case that post-dated *Palermo.* In any event, since petitioner has shown no such conflict between the notes and Newman's testimony, it follows that the Compulsory Process Clause is of no avail to him."[49]

[49] *Washington* v. *Texas*, 388 U.S. 14, upon which *amici* also rely (Am. Br. 20), involved a state statute that made the testimony of an accomplice "inadmissible whether he was present in the courtroom or not" (388 U.S. at 19). The Court found that such an "arbitrary rule," preventing "whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief," violated the Compulsory Process Clause (*id.* at 22). While *Washington* v. *Texas* thus obviously means that there is more to the Compulsory Process Clause than the right to secure the attendance of witnesses in court, it does not mean that a defendant has the right to inspect material in the prosecutor's file that is not otherwise producible.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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